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ABSTRACT

World reaction to the 1995 release from house arrest of Aung San Suu Kyi, leader and founder of the major opposition party in Burma (now Myanmar), indicates significant change in international relations, specifically in the international political system. The total sovereign states today (249) have increased, as have system "rules" relating to human rights. The concept of human rights was introduced in the 17th century; until World War II, citizens' liberties were considered the bailiwick only of their respective nations; no nation was to interfere with another's administration of rights. The United Nations (UN), created in 1945, was the first manifestation of the idea that a nation's treatment of its citizens should concern the rest of the world. The original member states agreed that "human rights and fundamental freedoms" should be a high priority. The UN, regional human rights regimes, and nongovernmental organizations primarily have been responsible for monitoring and administering human rights in the international community. Many critics have expressed disappointment with the UN's attempts to establish and enforce human rights. Regional rights organizations in Western Europe, however, have enjoyed several successes in this realm; African, Asian, and Middle Eastern regimes have seen limited success. It is generally agreed that nongovernmental organizations have achieved the most. Despite accomplishments in human rights, no proclamation, international court, or commission can guarantee that human rights will be upheld. This prompts the question: do bills or declarations of rights really matter? The question should be at the core of civic education for democracy and liberty. Contains 34 references. (LAP)

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# THE HUMAN RIGHTS CHALLENGE

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## Introduction

On July 10, 1995 television broadcasts and the headlines of newspapers around the world jubilantly announced the release of Daw (Madam) Aung San Suu Kyi, founder and leader of the major opposition party in Burma (now called Myanmar). For six years the 1991 Nobel Peace laureate had been under house arrest even though her party, the National League for Democracy (NLD), in an extraordinary landslide victory had won 392 of the 485 seats contested. The military government, known as the State Law and Order Restoration Council (SLORC), refused to recognize the results of the election, despite the fact that it had agreed earlier to the contest. Instead of acceding to the expressed will of the Burmese people, SLORC launched a massive crackdown on civil liberties. Newly elected and freely chosen members of parliament and their supporters were hustled off to jail. Hundreds of these political prisoners still are incarcerated, while tens of thousands of civilians are being forced to work on construction projects or as military porters under intolerable conditions.

The release of Aung San Suu Kyi and the attention which now is being focused on the plight of her fellow Burmese is attributed in part to unremitting pressure from the international community. That pressure comes from many sources ranging from the World Bank, the International Monetary Fund and the United States Congress to multinational corporations and nongovernmental organizations (NGOs).

The case of Aung San Suu Kyi and of Burma, unfortunately, is not the only glaring example of violations of civil, political and human rights in the world today. But what is instructive about this case is the response to it. How and why the world has reacted as it has is indicative of something akin to a sea change in international relations. Dennis Driscoll, Senior Lecturer in Law at the National University in Ireland, claims that the international political system has undergone a number of changes which now "distinguish our present system from any previous historical system." The most readily apparent change is the geometric growth in the number of states in the system itself. The 1995 Freedom House Survey puts the number of sovereign states at 191, with 58 related territories. That makes a total of 249 political entities in the world today. Along with the growth in numbers, there has been a phenomenal growth in the "rules" of the international system, particularly rules with regard to human rights.

## Natural Rights, Sovereignty and Nonintervention

Human rights are claims that all persons are entitled to by virtue of the fact that they are human beings. When the concept was introduced in the seventeenth century, these claims were described as natural rights. Natural rights were held to be inviolable, because human beings possessed them in "a state of nature," and it was they who created governments to protect these rights. Thomas Jefferson, author of the Declaration of Independence, was strongly influenced by the thinking of natural rights philosophers, especially John Locke, as the following excerpt from that document shows.

> *We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these rights are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed....*[1]

Although the natural rights of all human beings were said to antedate the political community, rights were thought to relate to citizenship in a particular state. The French Declaration of the Rights of Man and Citizen of 1789, for example, begins with the bold assertion that the rights of man are "natural, inalienable and sacred." That statement, however, is followed with the demurrer that "the source of all sovereignty resides essentially in the nation; no group, no individual may exercise authority not emanating expressly therefrom."[2] Prior to the mid twentieth century, nations considered rights to be purely internal or domestic concerns. In addition, they held that the right of sovereignty has a correlative duty: nonintervention. Other states, therefore, were obliged not to interfere in matters essentially within the jurisdiction of a sovereign state.

The idea that the practices of a sovereign state and the treatment of its own citizens were matters which should concern the rest of the world began to take hold during the course of World War II and in the period immediately following it. When the United Nations (UN) was created in 1945, its charter set forth two purposes:

- to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and

- to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56 of the Charter obligates member states "to take joint and separate action in cooperation with the Organization" to achieve its purposes. The precise legal significance of this pledge by member states to "take joint and separate action" became an immediate matter of contention. Many argued that the human rights provisions of the Charter cannot be ignored and that the principle of good faith in treaty interpretation imposes a duty on member states to observe fundamental human rights. Others contended that the words of the Charter refer to "promoting," "encouraging," and "assisting in the realization of human rights," and not to "guaranteeing" or "protecting them." It is impossible, they said, to speak of a "right" unless its precise legal content is denominated.

In light of those differences of opinion, the fifty one original member states of the United Nations believed that specifying what was meant by the terms "human rights and fundamental freedoms" ought to be a high priority. At the closing session of the founding conference in San Francisco, President Harry Truman not only urged the delegates to take up that responsibility. He went even farther saying "We have good reasons to expect the framing of an international bill of rights...that...will be as much a part of international life as our own (U.S.) Bill of Rights is a part of our Constitution."

### The Universal Declaration of Human Rights

The United Nations set about that work almost immediately. It established a Commission of Human Rights in early 1946 and charged the Commission with taking the first step, drafting what was to become known as the Universal Declaration of Human Rights.

The Universal Declaration of Human Rights was adopted in 1948 without dissent, although the Soviet bloc nations, South Africa and Saudi Arabia abstained from voting. Dr. H. V. Evatt of Australia, who was then President of the General Assembly, drew attention to the historic significance of the United Nation's action. He said that this was the first occasion on which the organized world community had recognized the existence of human rights and fundamental freedoms transcending the laws of sovereign states. Dr. Evatt predicted accurately that "millions of men, women and children all over the world...will turn for help, guidance and inspiration to this document." Dr. Evatt's statement that nations would abandon claims of sovereignty in respect to human rights and fundamental freedoms was less accurate, however. It has proved to be more an expression of hope than of reality.

Although the Universal Declaration of Human Rights is rightfully regarded as a major achievement, it is a resolution of the United Nations General Assembly, not a treaty. As such, it is not binding in international law. Drafters of the Declaration intended, therefore, to follow it with a treaty, or covenant, that would give human rights binding force in international law. They found, however, that the momentum of the immediate post World War II years was not sustainable. After eighteen years of what one scholar describes as "haggling," the United Nations finally approved not the single treaty it had envisioned, but three separate documents: the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights. These three documents taken together make up what is called the International Bill of Rights.

**The International Bill of Rights**

Detailed discussion of the documents which comprise the International Bill of Rights is beyond the scope of this article. Former President Jimmy Carter, however, captured their essence when he said "the International Covenant on Civil and Political Rights concerns what governments must not do to their people, and the International Covenant on Economic, Social and Cultural Rights concerns what government must do for their people."

Controversy about the Covenants began even before they were completed, and it continues to rage today in both political and intellectual circles. To understand the controversy it is necessary to take into account the dramatic changes in the composition of the United Nations General Assembly that occurred between 1948, when the Universal Declaration was accepted, and 1966, when the International Bill of Rights was promulgated. During those eighteen years a host of newly independent nations became members. As a matter of fact, more than twice as many nations participated in the writing of the International Bill of Rights as in the drafting of the Declaration. The newly independent nations expressed concerns about the limited number of the rights specified in the Universal Declaration. It had proclaimed twenty five substantive rights. Only five of them concerned economic rights such as the right to work, form and join labor unions, and "to a standard of living adequate for the health and well-being" of a family. Classic civil and political rights were recognized in eighteen other articles. These included such rights as freedom of expression and assembly and equal protection of the law. The Covenants, however, not only were much more specific and demanding, they included new rights. The right of "peoples" to self-determination, for example, was a radical departure from the conception of a standard of individual rights. The right of peoples to self determination was not mentioned in the Declaration. Nonetheless, it appears in the first article of both covenants. Article 27 of the



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Covenant on Civil and Political Rights also recognizes the right of ethnic, religious or linguistic minorities "in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Controversy about the two Covenants began even before they were completed, and it has continued to rage in both political and intellectual circles. At issue, in particular, are the proclamation of group as opposed to individual rights and economic as opposed to political and civil rights.

The cause of group rights has been championed in the United Nations in the main by developing and communist countries. Their position was enunciated by Adolfo Pérez Esquivel, 1980 Winner of the Nobel Peace Prize, who said:

> *The International Bill of Human Rights of the United Nations...is a sign of the progressive capturing of the general conscience of humanity by the issues of the rights of man and the rights of peoples.... The struggle in defense of these rights cannot limit its perspective and its actions to the confrontation between the individual and the state. Not only must the rights of individuals be repossessed for the sake of personal liberty, but so also must collective rights of peoples, be reclaimed on behalf of the social unit.*[3]

The cause of economic rights also has its proponents, drawn mainly from developing and communist countries—José Figueres, former President of Costa Rica, advanced their argument when he said:

> *The two covenants of the United Nations correctly equate economic and social rights with civil and political rights.... The fulfillment of human rights <u>requires</u> economic and social development. Development requires not only corrections to the internal causes of poverty in the retarded nations, but also a full revision of all economic relations with advanced countries.... Human rights...can only be achieved by a combination of high production and fair distribution. In theory at least, you could even have a society juridically so constituted that everybody enjoys civil rights and everybody is poor.*[4]

There are many critics of the stance on group and economic rights taken in the two covenants, however. They allege that emphasizing group and economic rights enables authoritarian governments in poor countries to justify their failure to respect the civil and political rights of individuals by claiming that the fault is not theirs. Fault, the authoritarian governments insist, should be attributed to richer countries, because they have not provided adequate development assistance. Andrei Sakharov, however, countered their arguments. The 1975 Nobel Peace Prize winner and celebrated Russian dissident contended that contrary to the official state propaganda of countries which gives primacy to economic and social rights, it is <u>really</u> civil and political rights that guarantee individual liberty and give life to social and economic rights.

Sakharov's position was more in accord with the beliefs of most Americans. Throughout their history, Americans have considered civil and political rights and liberties to be their prime concern. Civil liberties, or restraints on the power of government, have been written into the United States Constitution, as well as into the constitutions of all fifty states. It was no surprise, therefore, that when Jimmy Carter signed the two international Covenants on behalf of the United States during the first year of his Presidency, he was careful to distinguish civil and political rights from economic, social and cultural rights. Carter said, "by ratifying the Covenant on civil and political rights, a government pledges, as a matter of law, to refrain from subjecting its own people to arbitrary imprisonment or to cruel and degrading treatment. It recognizes the right of every person to freedom of thought, freedom of conscience, freedom of association, the right of peaceful assembly, and the right to emigrate from one's country." However, Carter continued, "by ratifying the other covenant on economic, social and cultural rights a government commits itself to its best efforts to secure for its citizens the basic standards of material existence, social justice and cultural opportunity."

Carter forwarded the two Covenants to the United States Senate for ratification in 1977, but they languished there. It was not until April 2, 1992 that two thirds of the Senators present consented to ratification of the International Covenant on Civil and Political Rights, but with more than a dozen reservations attached to its advice and consent. No action has yet been taken on the Covenant for Economic, Social and Cultural Rights, nor is any likely in the foreseeable future. The attitude of most Americans toward the primacy of civil and political rights remains essentially the same today as it was when it was explained in an address to the United Nations by Richard Williamson, Assistant Secretary of International Organization Affairs, seven years ago, on the 40th anniversary of the Universal Declaration.

> *We [the United States government] view human rights as limitations upon the power of the state. Based on the principles set forth in the Bill of Rights of the U.S. Constitution, our view of human rights is centered on defenses from the state, accorded every individual and protected by an independent judiciary. These rights are timeless, unalterable, and not subject to the intellectual or political fashions of the day. They establish the state as the servant of the people and not the other way around...The past 25 years have seen a tendency to redefine human rights to include a new category of 'social and economic rights', such as the right to education, the right to food, or the right to housing...In contrast to our notion of human rights as limitations upon the power of the state, these 'rights' would augment the power of the state, make individuals more dependent, and could not be enforced by an independent judiciary. The United States sees these socioeconomic 'rights' as the goals of sound policy rather than as true human rights.*[5]

### The United Nations and Human Rights

Responsibility for monitoring and implementing human rights in the international community has devolved primarily on the United Nations, regional human rights regimes, and nongovernmental organizations (NGOs). A brief review of the records of these three groups is in order here.



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There has been considerable disappointment with the United Nations record in respect to human rights. Walter Laqueur and Barry Rubin have been early and consistent critics. In the preface to the first edition of *Human Rights Reader* in 1978 they wrote: "...while millions of men and women have indeed turned to the Universal Declaration of Human Rights, they have received very little guidance and no help from the organization that propagated it. The failure of the United Nations to live up to early expectations and to become an effective instrument for the promotion of human rights has induced individual governments and nongovernmental bodies to take fresh initiatives in this area."

Jack Donnelly in his recent book *International Human Rights* characterizes United Nations initiatives as limited, tentative, and "even timid." He attributes the United Nations lack of success to the fact that is members are sovereign states. "Delegates to the United Nations represent states, not the international community, let alone those individuals whose rights are violated by states. And the United Nations like other intergovernmental organizations, has only those powers that states, the principal violators of human rights, give it.....For victims of human rights violations, this is of little comfort, more an explanation than a justification. Nonetheless, in evaluating the human rights achievements of the United Nations...it would be naive, perhaps even irresponsible, to ignore the basic fact of sovereignty and the limits it imposes."[6]

In an article entitled "Why the UN Fails" written on the occasion of the Organization's 50th anniversary, Saadia Touval of Tel Aviv University also took a pessimistic view. He believes that "...a egregious gap has grown between popular expectations and United Nations abilities.... It has little real political leverage. Its promises and threats lack credibility.... Those limitations are ingrained. They are embedded in the very nature of intergovernmental organization, and no amount of upgrading, expansion, or revamping of United Nations powers can correct those flaws. Rather it is time to recognize the United Nations shortcomings and to quit dumping on the organization tasks that it cannot perform."[7]

**Regional Human Rights Regimes**

If the United Nations has many detractors insofar as its human rights record is concerned, regional rights organizations in Western Europe, are credited with some noteworthy achievements. It was in 1949, just one year after the Universal Declaration had been adopted, that leaders of postwar Europe met to create a new regional international organization, the Council of Europe. At the first session of the Council, Winston Churchill argued that a "European Court" should be established before which violations of human rights "might be brought to the attention of the civilized world." The European Convention on Human Rights, which has now been ratified by twenty seven countries, did just that. It established two special human rights institutions, a Commission and a Court. Mark Janis of Oxford University, is lavish in his praise of the European Human Rights Convention which he says has made "truly a distinctive contribution to modern international law." Janis claims that "the effectiveness of the European Court is remarkable." The Court not only has dealt with a daunting case load, it has been increasingly willing to find states in violation of the Convention. What the Commission and the Court now must do, in Janis' opinion, is to "continually and carefully balance the scales between asserting their authority on the one side and avoiding too dangerous confrontation with national governments on the other. So far their balancing seems to be working."[8]

Another regional human rights regime whose procedures revolve around a commission and a court is in the Americas. Since it began operating in 1980, the Inter American Court of Human Rights has decided very few contentious cases. The Commission, whose authority unlike that of the European human rights regime does not rest on a separate human rights treaty, receives about five hundred communications yearly. The Commission usually seeks additional information and then attempts to facilitate an amicable settlement between the State and the complaining individual. Its decisions, however, have usually been ignored, in sharp contrast to those of its European counterpart. Many Central and South American countries have been or still are suffering from repressive military or one party rule. The rights of individuals and groups are systematically violated by these authoritarian governments as a means of perpetuating their power.

Fledgling human rights regimes have been struggling for a toehold in Africa, Asia and the Middle East. To date they have enjoyed limited success. The African Charter on Human and Peoples' Rights—or the Banjul Charter, as it often is called, after its site of adoption (Banjul, The Gambia)—entered into force in 1986. Just six years later, in 1992, forty nine African nations had become signatories. The Banjul Charter gives unusual emphasis to collective or peoples' rights and individual duties. Article 29 [2] is a case in point. It provides that it is the duty of the individual "to serve his national community by placing his physical or intellectual abilities at its service." The Banjul Charter also has a number of so-called "clawback" clauses. For example, Article 6 recognizes "the right to liberty and to the security of the person," but then it goes on to qualify—and to compromise—that right by adding that "no one may be deprived of his freedom except for reasons and conditions previously laid down by law." Other "clawback" provisions provide for freedom of speech but only "within the law" and for freedom of conscience, provided that it is "subject to law and order."

Clement Nwankwo, a lawyer and founder and president of the Constitutional Rights Project based in Lagos, Nigeria, is highly critical of the African Charter. He alleges that it is "aimed more at creating an impression of liberalism than at curbing human rights abuses in Africa, most of which were being perpetrated by the very governments that signed the instrument." Nwankwo describes the African Commission on Human and Peoples' Rights, established under the Charter as, "a toothless watchdog—kept around for appearance's sake, but utterly unable to help with the safeguarding of human rights on the continent."[9]

There are a few signs of hope for human rights and democracy in Africa, sparked by recent free elections and other democratic advances, particularly those in South Africa. It is hoped that South Africa now will be able to provide leadership and support for human rights efforts throughout the continent. However, as Africa-watchers point out, acceptance of democratic systems, the institutionalization of the rule of law in many countries, and civil society remain weak while "one man-no-vote rules," military regimes and civil wars abound.

The human rights situation in Asia is especially discouraging, because Asia continues to be an area of impressive economic growth rates but of poor human rights. The *Human Rights Watch World Report 1995* pointed out that "one by one, developed countries pursued a policy of 'commercial diplomacy,' looking to China, Indonesia, India, Vietnam and even Burma for investment opportunities and good trade deals. Human rights concerns were inevitably pushed to the sidelines, and repressive governments could feel triumphant." Burma, Bhutan, Vietnam, Singapore and Indonesia continue to use the state's security apparatus against dissenters and to

exert tight control over the media in order to maintain their power. These states still rely on torture to silence their critics. Even so, some advocates of political freedom and democracy have not lost hope. Dr. Sein Win, who was elected to the Burmese parliament in 1990, but not allowed to serve, recently said: "We know that it's not easy to mount political opposition to an entrenched dictatorship. (Burma, now Myanmar, has been under one party military rule for more than three decades). Look at the Polish experience—there it took ten years for Solidarity to prevail, even though it enjoyed much more assistance from democratic forces abroad than we have received. Nonetheless, we are confident that in Burma, too, democracy will eventually triumph."[10]

The human rights situation may be most lamentable in the Middle East. The League of Arab States established a Permanent Arab Commission on Human Rights in 1968. The Commission, however, has done little other than its occasional efforts to publicize human rights violations in Israeli-occupied territory. No authoritative regional human rights norms have yet been established. Although great international efforts have been made to bring about an Arab-Israeli peace, domestic political conflicts between middle eastern governments and opposition groups have had greater impact on human rights conditions. Internal political conflicts have flared up throughout the Middle East. Witness the chaos in Algeria, the unrest in Iraq, Iran, Israel, Bahrain, Egypt and Saudi Arabia, and the civil war in Yemen. Political Islamic fundamentalism is a force everywhere in the Middle East today and David Korn, former diplomat, warns of its potential consequences.

> *Few who have seriously considered the question believe that democracy and human rights...could survive in a polity ruled by the precepts of religious dogma (be it Islam, Christianity or Judaism), which in effect is what political Islam is all about. More important still, the learned apologists for Islam have yet to explain away the most damning evidence against it: that so many of those that claim its name preach xenophobia and religious hatred and employ murder as a paramount weapon for attaining their ends.*[11]

**Achievements of the NGOs**

There is general agreement that the most notable success in monitoring human rights and in prodding reluctant governments to implement them has been achieved by nongovernmental organizations (NGOs). Human rights NGOs have emerged as a notable political force throughout the world. Their accomplishments are many. One of their first important contributions was to help legitimize international concern for human rights. They also have been instrumental in incorporating concern for human rights into the foreign policy of individual countries. Over the past fifteen years, groups such as Amnesty International, and Human Rights Watch have become accepted as authoritative sources of information both by the media and in parliaments of the western world. In addition, NGOs serve as monitors and consultants to the United Nations and to regional human rights regimes.

In recent years, human rights NGOs have proliferated. There are hundreds of them in the United States and hundreds more in European countries. Even tiny Nepal has seen more than two thousand NGOs established in the last four years. Not all NGOs can boast of memberships of a million or more, as can Amnesty International. But their effectiveness often does not depend on



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numbers. Argentina's Mothers of the Plaza de Mayo, for example, was founded in April, 1977 by fourteen women frustrated with official government channels in their search for their disappeared children. Every Thursday afternoon they assembled in the main square of Buenos Aires, white scarves on their heads to walk silently around and around the Plaza to protest Argentine's "Dirty War." Often they were harassed and sometimes even attacked. Nine mothers and two French nuns who participated in the silent vigil simply disappeared, never to be seen again. Nonetheless, the mothers persevered. More joined their ranks, including the Grandmothers of Plaza de Mayo, until by 1988 they had five thousand members and were able to set up a small office. Human rights violations have diminished but not ceased in Argentina, despite the efforts of a valiant human rights community. Because the human rights community condemned President Carlos Menem's 1990 pardon of military officers convicted of crimes committed in the "dirty war," NGO members have been subject to anonymous threats and various forms of intimidation, but their efforts to monitor and correct violations of human rights continues.

It would be wrong, however, to leave the impression that the NGO story is one of unmitigated success. Almost without exception human rights organizations suffer from a lack of resources. They are dependent upon contributions of time, talent and money from public-spirited citizens or from charitable foundations. Their major weapons in the fight against human rights violations are publicity and persuasion. "It's up to the nongovernmental organizations to keep the governments honest," said one delegate to The Fourth World Conference on Women in Beijing in 1995. Members of NGOs, however, sometimes pay a high price for trying to "keep governments honest." Many states use their powers of coercion against human rights activists, turning them into new victims.

**Do Declarations of Rights Matter?**

The euphoria which surrounded the establishment of the United Nations in 1945, the promulgation of the Universal Declaration of Human Rights in 1948, and the downfall of communism in Eastern Europe in 1989 has been replaced by more sober assessments of the human condition. The world has learned that there are no quick and easy ways to democratize once authoritarian states or to prevent them from reverting to the status quo ante. The world also has learned that proclaiming rights and even establishing courts and commissions does not guarantee that human rights will be respected. One is prompted, therefore, to raise the question: do bills or declarations of rights really matter?

Interestingly enough that same question was raised at the time that the United States Constitution and later its Bill of Rights were submitted for ratification. A relatively unknown judge who then sat on Virginia's highest court provided an answer in a long forgotten commentary. The judge was St. George Tucker, a longtime friend of Jefferson and Madison. His answer appears to be as full of truth and as applicable to our time as it was to his:

> *A bill of rights may be considered, not only as intended to give law, and assign limits to a government...but as giving information to the people. By reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated; a circumstance, of itself, sufficient, I conceive, to counterbalance every argument against one.*[12]

## Notes

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2. "French Declaration of the Rights of Man and Citizen of 1789." Reprinted in the 1989 Laqueur and Rubin's *Human Rights Reader*, pp. 118-119.

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